

operator has an attributable interest shall also apply to any satellite cable programming vendor in which an open video system operator has an attributable interest, except as limited by paragraph (a)(1)-(3) of this section.

(1) Section 76.1002(c)(1) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which an open video system operator has an attributable interest, or any satellite broadcasting vendor in which an open video system operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) Section 76.1002(c)(2) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

(3) Section 76.1002(c)(3)(i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows:

(i) Unserved areas. No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(ii) Served areas. No open video system operator shall enter into any

subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in Section 76.1002(c)(3)(iii).

(b) No open video system programming provider in which a cable operator has an attributable interest shall:

(1) engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

§ 76.1508 Network non-duplication.

(a) Sections 76.92 through 76.97 shall apply to open video systems in accordance with the provisions contained in this section.

(b) Any provision of section 76.92 that refers to a "cable community unit" or "community unit" shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). Any provision of section 76.92 that refers to a "cable television community" shall apply to an open video system community. Any provision of section 76.92 that refers to a "cable television system's mandatory signal carriage obligations" shall apply to an open video system's mandatory signal carriage obligations.

(c) Any provision of section 76.94 that refers to a "cable system operator" or "cable television system operator" shall apply to an open video system operator. Any provision of

section 76.94 that refers to a "cable system" or "cable television system" shall apply to an open video system except section 76.94(e) and (f) which shall apply to an open video system operator. Open video system operators shall make all notifications and information regarding the exercise of network non-duplication rights immediately available to all appropriate video programming provider on the system. An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(d) Any provision of section 76.95 that refers to a "cable system" or a "cable community unit" shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

§ 76.1509 Syndicated program exclusivity.

(a) Sections 76.151 through 76.163 shall apply to open video systems in accordance with the provisions contained in this section.

(b) Any provision of section 76.151 that refers to a "cable community unit" shall apply to an open video system.

(c) Any provision of section 76.155 that refers to a "cable system operator" or "cable television system operator" shall apply to an open video system operator. Any provision of section 76.155 that refers to a "cable system" or "cable television system" shall apply to an open video system except section 76.155(c) which shall apply to an open video system operator. Open video system operators shall make all notifications and information regarding exercise of syndicated program exclusivity rights immediately available to all appropriate video programming provider on the system. An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(d) Any provision of section 76.156 that refers to a "cable community" shall apply to an open video system community. Any provision of section 76.156 that refers to a "cable community unit" or "community unit" shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). Any provision of sections 76.156 through 76.158, and 76.163 that refers to a "cable system" shall apply to an open video system.

(e) Any provision of section 76.159 that refers to "cable television" or a "cable system"

shall apply to an open video system.

(f) Any provision of section 76.161 that refers to a "community unit" shall apply to an open video system or that portion of an open video system that is affected by this rule.

§ 76.1510 Application of certain Title VI provisions.

The following sections within Part 76 shall also apply to open video systems: Sections 76.71, 76.73, 76.75, 76.77 and 76.79 (Equal Employment Opportunity Requirements); Sections 76.503 and 76.504 (ownership restrictions); Section 76.981 (negative option billing); and Sections 76.1300, 76.1301 and 76.1302 (regulation of carriage agreements); provided, however, that these sections shall apply to open video systems only to the extent that they do not conflict with this subpart S. Section 631 of the Communications Act (subscriber privacy) shall also apply to open video systems.

§ 76.1511 Fees.

An open video system operator may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under Section 622 of the Communications Act. Gross revenues under this paragraph means all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers. Gross revenues does not include revenues collected by unaffiliated video programming providers from their subscribers. Any gross revenues fee that the open video system operator or its affiliate collects from subscribers shall be excluded from gross revenues. An operator of an open video system may designate that portion of a subscriber's bill attributable to the fee as a separate item on the bill.

§ 76.1512 Programming information.

(a) An open video system operator shall not unreasonably discriminate in favor of itself or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purpose of selecting programming on the open video system, or in the way such material or information is provided to subscribers.

Note to paragraph (a): "Material or information" as used in paragraph (a) of this section means material or information that a subscriber uses to actively select programming at the point of program selection.

(b) In accordance with paragraph (a) of this section:

(1) An open video system operator shall not discriminate in favor of itself or its affiliate on any navigational device, guide or menu;

(2) An open video system operator shall not omit television broadcast stations or other unaffiliated video programming services carried on the open video system from any navigational device, guide (electronic or paper) or menu. For programming services that an open video system subscriber has not ordered, menus provided by an open video system operator shall, at a minimum, inform the subscriber how to access an additional screen that lists the unordered programming services.

(c) An open video system operator shall ensure that video programming providers or copyright holders (or both) are able to suitably and uniquely identify their programming services to subscribers.

(d) An open video system operator shall transmit programming identification without change or alteration if such identification is transmitted as part of the programming signal.

§ 76.1513 Dispute resolution.

(a) Complaints. Any party aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this part or in Section 653 of the Communications Act (47 U.S.C. § 573) may commence an adjudicatory proceeding at the Commission. The Commission shall resolve any such dispute within 180 days after the filing of a complaint.

(b) Alternate dispute resolution. An open video system operator may not provide in its carriage contracts with programming providers that any dispute must be submitted to arbitration, mediation, or any other alternative method for dispute resolution prior to submission of a complaint to the Commission.

(c) Notice required prior to filing of complaint. Any aggrieved party intending to file a complaint under this section must first notify the potential defendant open video system operator that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in this part or in Section 653 of the Communications Act. The notice must be in writing and must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(d) General pleading requirements. Complaint proceedings under this part are generally resolved on a written record consisting of a complaint, answer, and reply, but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standard:

- (1) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity;
- (2) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Communications Act or of a Commission regulation or order, or a defense to such alleged violation;
- (3) Facts must be supported by relevant documentation or affidavit;
- (4) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority;
- (5) Opposing authorities must be distinguished;
- (6) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies; and
- (7) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(e) Complaint.

- (1) A complaint filed under this part shall contain:
 - (i) The name of the complainant and each defendant;
 - (ii) The type of entity that describes complainant (e.g., individual, private association, partnership, or corporation), the address and telephone number of the complainant, and the address and telephone number of each defendant;
 - (iii) The name, address and telephone number of complainant's attorney, if complainant is represented by counsel;
 - (iv) Citation to the section of the Communications Act and/or the Commission regulation or order alleged to have been violated;
 - (v) A complete statement of facts, which, if proven true, would constitute such a violation;
 - (vi) Any evidence that supports the truth or accuracy of the alleged facts;
 - (vii) Evidence that the open video system operator's conduct at issue violated a section of the Communications Act and/or Commission regulation or order.
 - (viii) If discrimination in rates, terms, and conditions of carriage is alleged, documentary evidence shall be submitted such as a preliminary carriage rate estimate or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing video programming provider or, if no programming contract or preliminary carriage rate estimate is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further

specific comparative information;

(ix) If a programming contract or a preliminary carriage rate estimate is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein; and

(x) The specific relief sought

(2) Every complaint alleging a violation of the open video system requirements shall be accompanied by a sworn affidavit signed by an authorized officer or agent of the complainant. This affidavit shall contain a statement that the affiant has read the complaint and that to the best of the affiant's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted under Commission regulations and policies, or is a good faith argument for the extension, modification or reversal of such regulations or policies, and it is not interposed for any improper purpose. If the complaint is signed in violation of this rule, the Commission upon motion or its own initiative, shall impose upon the complainant an appropriate sanction.

(3) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

Before The Federal Communications Commission, Washington, D.C. 20554

In the Matter of Complainant

v.

File No. (To be inserted by the Commission)

Defendant.

[Insert Subject or Nature of Issue: Unjust or Unreasonable Discrimination in Rates, Terms, and Conditions; Discriminatory Denial of Carriage]

Open Video System Complaint

To: The Commission.

The complainant (here insert full name of complainant and type of entity of such complainant):

1. (Here state the complainant's post office address and telephone number).
2. (Here insert the name, address and telephone number of each defendant).
3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)

(Name of complainant)

(Name, address, and telephone number of attorney, if any)

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (c) of this section has been made.

(f) Answer.

(1) Any open video system operator upon which a complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material

allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(3) The answer shall state concisely any and all defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(4) Averments in a complaint are deemed to be admitted when not denied in the answer.

(5) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification relied upon in support of the differential. Any documents or contracts submitted pursuant to this subparagraph may be protected as proprietary pursuant to paragraph (j) of this section.

(g) Reply. Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defense set forth therein. Replies containing information claimed by defendant to be proprietary under paragraph (j) of this section shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the defendant.

(h) Motions. Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(i) Discovery.

(1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories or document production.

(2) The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff will then hold a status conference with the parties, pursuant to paragraph (1) of this section, to determine the scope of discovery. If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff will advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (o) of this section.

(j) Confidentiality of proprietary information.

(1) Any materials generated or provided by a party in connection with the pre-complaint notification procedure required under paragraph (c) of this section and in the course of adjudicating a complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

- (i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;
- (ii) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;
- (iii) Consultants or expert witnesses retained by the parties;
- (iv) The Commission and its staff; and
- (v) Court reporters and stenographers in accordance with the terms and conditions of this section.

(3) The persons designated in paragraph (j)(2) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(4) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (j)(2) of this section. Each party shall maintain

a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(5) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

(k) Other required written submissions.

(1) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits.

(3) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.

(4) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(5) Briefs containing information which is claimed by an opposing or third party to be proprietary under paragraph (j) of this section shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 of this chapter, and shall be clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited version is submitted and served on opposing parties.

(l) Status conference.

(1) In any complaint proceeding under this part, the Commission staff may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

- (i) Simplification or narrowing of the issues;
- (ii) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;
- (iii) Obtaining admissions of fact or stipulations between the parties as to

any or all of the matters in controversy:

- (iv) Settlement of the matters in controversy by agreement of the parties;
- (v) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;
- (vi) The need and schedule for filing briefs, and the date for any further conferences; and
- (vii) Such other matters that may aid in the disposition of the complaint.

(2) Any party may request that a conference be held at any time after the complaint has been filed.

(3) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(4) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

(5) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of the complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to take affirmative action not subject to deadlines established by another provision of this part, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the staff.

(m) Specifications as to pleadings, briefs, and other documents; subscriptions.

(1) All papers filed in a complaint proceeding under this part must be drawn in conformity with the requirements of Sections 1.49 and 1.50 of this chapter.

(2) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(3) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper: that to the best of his or her knowledge,

information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose upon the party an appropriate sanction. Where the pleading or submission is signed by counsel, the provisions of Sections 1.52 and 1.24 of this chapter shall also apply.

(n) Copies; service.

(1) The complainant shall file an original plus three copies of the complaint with the Commission. However, if the complaint is addressed against multiple defendants, complainant shall provide three additional copies of the complaint for each additional defendant.

(2) An original plus two copies shall be filed of all pleadings and documents other than the complaint.

(3) The complainant shall serve the complaint on each defendant at the same time that it is filed at the Commission.

(4) All subsequent pleadings and briefs, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceeding, together with proof of such service in accordance with the requirements of Section 1.47 of this chapter.

(5) The parties to any complaint proceeding brought pursuant to this section may be required to file additional copies of any or all papers filed in the proceeding.

(o) Referral to administrative law judge.

(1) After reviewing the complaint, answer and reply, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any complaint proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Cable Services Bureau Chief, the Cable Services Bureau Chief shall not be deemed to be a party to a complaint proceeding designated for a hearing before an administrative law judge pursuant to this paragraph.

(p) Petitions for reconsideration. Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration of a decision on the merits made by the Commission's staff should be filed in accordance with Sections 1.104 through 1.106 of this chapter.

(q) Interlocutory review.

(1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and raised as an exception to a decision on the merits:

(i) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling:

(ii) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right; and/or

(iii) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(r) Expedited review.

(1) Any party to a complaint proceeding under this part aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with Section 1.115 of this chapter.

(2) Any party to a complaint proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with Section 1.276(a) and Sections 1.277(a) through (c) of this chapter, except that unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.

(s) Frivolous complaints. It shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this part. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

(t) Statute of limitations. Any complaint filed pursuant to this subsection must be filed within one year of the date on which the following acts or conduct occur which form the basis of the complaint:

(1) The open video system operator enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this part; or

(2) The open video system operator offers to carry programming for the

complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this part; or

(3) The complainant has notified an open video system operator that it intends to file a complaint with the Commission based on a request for such operator to carry the complainant's programming on its open video system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this part.

(u) Remedies for violations.

(1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the requiring carriage, awarding damages to any person denied carriage, or any combination of such sanctions. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) Additional sanctions. The remedies provided in paragraph (u)(1) of this section are in addition to and not in lieu of the sanctions available under Title VI or any other provision of the Communications Act.

§ 76.1514 Bundling of video and local exchange services.

An open video system operator may offer video and local exchange services for sale in a single package at a single price, provided that:

(1) the open video system operator, where it is the incumbent local exchange carrier, may not require that a subscriber purchase its video service in order to receive local exchange service; and

(2) Any local exchange carrier offering such a package must impute the unbundled tariff rate for the unregulated service.

Appendix C

INSTRUCTIONS FOR FCC FORM 1275
OPEN VIDEO SYSTEM CERTIFICATION OF COMPLIANCE
(pending OMB approval)

Purpose of this Form

Section 653(a)(1) of the Communications Act, 47 U.S.C. § 573(a)(1), provides that an open video system operator must certify to the Commission that it complies with the Commission's regulations under Section 653(b) of the Communications Act, 47 U.S.C. § 573(b). This FCC Form 1275 is to be used by an open video system applicant to obtain certification from the Commission. The Commission will publish notice of the receipt of FCC Form 1275 and will post the Form on its Internet site. The certification will be deemed approved if the Commission does not disapprove the certification within ten days of the Commission's receipt of the filing.

Please be sure to review all relevant FCC regulations and these instructions before completing this Form.

Filing Information

A hard copy of FCC Form 1275 and all attachments must be filed with the Office of the Secretary, Federal Communications Commission, 1919 M Street N.W., Room 222, Washington D.C., 20554, and with the Office of the Bureau Chief, Cable Services Bureau, 2033 M Street, N.W., Washington, D.C. 20554. The applicant must also file the Form 1275 on computer disk at these same two locations. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using Windows 3.1 and Excel 4.0 software. The diskettes should be submitted in "read only" mode. The diskettes should be clearly labelled as an open video system certification filing, should indicate the applicant's name and date of submission, and should be accompanied by a cover letter. Any attachments or other material not easily stored on computer disk may be filed in hard copy only.

Instructions

Module A: Company Information. Indicate the applicant's name, address, telephone and fax numbers and the name of a person to contact for further information.

Module B: Ownership Information. Attach a statement of ownership interest in the open video system, including all affiliated entities.

Module C: Eligibility and Compliance Representations.

Line 1: If you are a cable operator applying for certification to operate within your cable

franchise area, indicate whether you are qualified to become an open video system operator under Section 76.1501 of the Commission's rules. You must also attach a brief statement explaining how you qualify under Section 76.1501. Section 76.1501 provides that a cable operator is qualified to operate within its cable franchise area if it is subject to "effective competition" in the franchise area, as defined in Section 623(l)(1) of the Communications Act, 47 U.S.C. § 543(l)(1). If a cable operator is not subject to effective competition in its cable franchise area, it may still qualify to operate an open video system under Section 76.1501, provided that the Commission has issued a finding that such operation would serve the public interest, convenience, and necessity. If you are not a cable operator applying for certification within your cable franchise area, check "N/A" to indicate that the question is not applicable.

Line 2: Indicate whether you agree to comply with Sections 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513 of the Commission's rules, implementing Section 653(b) of the Communications Act. In certifying compliance with these regulations, you agree to abide by the Commission's requirements regarding non-discriminatory carriage: just and reasonable rates, terms and conditions; a one-third capacity limit on the amount of activated channel capacity on which an open video system operator may select programming when demand for carriage exceeds system capacity; channel sharing; application of the rules concerning sports exclusivity, network non-duplication, and syndicated exclusivity; and non-discriminatory treatment in presenting information to subscribers.

Line 3: Indicate whether you agree to comply with the Commission's requirements for enrollment of and for notice to unaffiliated video programming providers.

Line 4: If you are required under Section 64.903(a) of the Commission's rules to file a cost allocation manual, indicate whether you agree to file changes to your cost allocation manual at least 60 days before the commencement of service. If you are not required under Section 64.903(a) to file a cost allocation manual, check "N/A" to indicate that the question is not applicable.

Module D: System Information.

Line 1: Describe generally the anticipated communities or areas to be served upon completion of your open video system. If the space provided on the form is insufficient, attach additional sheets as necessary.

Line 2: Indicate the amount of digital capacity anticipated on the open video system.

Line 3: Indicate the amount of analog capacity anticipated on the open video system.

Line 4: For switched digital systems, indicate the anticipated number of available channel input ports.

Module E: Verification Statement.

An officer or director of the applicant must sign and date Form 1275 certifying that, to the best of his or her information and belief, all representations contained in the filing are accurate according to the most recent information available.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information in this form is authorized by the Communications Act of 1934, as amended. The information provided in this form is used by the Commission to determine that open video system operators comply with the Commission's regulations under Section 653(b) of the Communications Act. In reaching that determination, or for law enforcement purposes, it may become necessary to provide personal information contained in this form to another government agency. If information requested on this form is not provided, processing may be delayed. All information provided in this form will be available for public inspection. Your response is required to obtain the requested certification. Individuals are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public reporting burden for this information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Division, Washington, D.C. 20554. **Do not send completed forms to this address.**

FCC FORM 1275 CERTIFICATION FOR OPEN VIDEO SYSTEMS

A. Company Information		
Company Name:		
Contact Person:		
Mailing Address:		
City:	State:	Zip Code:
Phone Number:	Fax Number:	

B. Attach a statement of ownership, including all affiliated entities

C. Eligibility and Compliance Representations			
	Yes	No	N/A
1. If you are a cable operator applying for certification within your cable franchise area, are you qualified to operate an open video system under 47 C.F.R. § 76.1501?			
2. Do you agree to comply and to remain in compliance with each of the Commission's regulations in 47 C.F.R. §§ 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513?			
3. Do you agree to comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers?			
4. If applicable, do you agree to file changes to your cost allocation manual at least 60 days before the commencement of service?			

D. System Information			
1. Provide a general description of the anticipated communities or areas to be served upon completion of the system.			
2. Anticipated Digital Capacity:		3. Anticipated Analog Capacity:	
4. If Switched Digital, Anticipated Number of Channel Input Ports:			

E. Verification Statement	
To the best of my information and belief, the representations made herein are accurate according to the most recent information available.	
Name:	Signature:
Title:	Date:

**Separate Statement
of
Chairman Reed E. Hundt**

The 1996 Telecommunications Act established multiple entry options for local exchange carriers and others seeking to provide video programming to subscribers. Pursuant to the 1996 Act, common carriers (and others) may offer video programming services to subscribers on a common carrier basis (subject to Title II regulation); through the use of radio communications (subject to Title III regulation); as a franchised cable operator (subject to Title VI regulation) or by means of an open video system (subject to reduced regulation under Section 653). Today the Commission adopts rules implementing the open video system option.

Consistent with Congress' goal of rapidly introducing competition into all segments of the telecommunications market, the 1996 Act establishes an aggressive time frame for the Commission to adopt rules governing the new open video system option. The Act requires the Commission to adopt open video system rules within six months of the date of enactment, including any reconsideration. This is deadline for Commission action is the shortest provided under the Act. Adoption today of this Order ensures that we will be successful in meeting, if not beating, this statutory deadline. I commend Meredith Jones and the Cable Services Bureau staff for their hard work in helping the Commission to achieve this goal.

As envisioned by Congress, open video systems will provide a vehicle for both intersystem competition between open video system operators and traditional multichannel video delivery services (e.g., cable, multichannel multipoint distribution service and direct broadcast satellite service), as well as intrasystem competition between the open video system operator's affiliated programming and unaffiliated programmers carried on the system. The rules we adopt promote both goals.

The statute prohibits open video system operators from selecting the programming carried on more than one third of the open video system channels where demand exceeds capacity. Within this construct, our rules are designed to ensure that open video system operators will have sufficient incentives and flexibility to construct and manage their systems and market program offerings that are competitive with incumbent video service providers. At the same time our rules seek to provide unaffiliated programmers with fair, reasonable and non-discriminatory access to the open video system platform. Such unaffiliated programming packages may either complement or compete with the programming offered by the open video system operator. In either case, consumers will benefit from increased competition, greater program diversity and expanded choice.

Our rules also reflect Congress' intent that open video systems be subject to reduced regulation in order to encourage rapid competitive entry. In this regard, open video system operators are exempted from Title VI rate regulation, customer service requirements, franchise requirements and franchise fees and other Title VI requirements. This streamlined regulatory

approach recognizes that in most markets open video system operators will be entering established markets competing directly against an incumbent cable operator. Although open video systems are subject to reduced regulatory burdens, the statute and our rules provide local governments with authority to impose a fee on the gross revenues of the open video system operator in lieu of a franchise fee permitted under Section 622 of the Act. Finally, our rules expressly recognize the essential role of local governments in managing the public rights-of-way. In this regard, local authorities may impose such conditions or restrictions on the use of the public rights-of-way as are permitted under state or local law, provided such conditions or restrictions are applied in a non-discriminatory and competitively neutral manner.

**SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO**

Re: Implementation of Section 302 of the Telecommunications Act; Open Video Systems (CS Docket 96-46)

This Second Report and Order implements several provisions of the Telecommunications Act of 1996 regarding open video systems (OVS), which created new sections 651 through 653 of the Communications Act of 1934. In keeping with the 1996 Act, this decision adopts a streamlined regulatory framework that: (1) exempts open video systems from certain requirements of Title VI and establishes that Title II common carrier requirements will not apply; (2) allows an OVS operator to offer its own programming while affording independent programmers the ability to reach subscribers directly; and (3) ensures access to the open video system by independent video programming providers on terms, including rates, that are just and reasonable. In doing so, this action is intended to bring new competition to the video programming distribution market.

As an initial observation, I believe that it is necessary to be especially aware of the potential implications arising from the fact that this complicated proceeding, unlike many other pressing matters raised in the Telecommunications Act of 1996, must be completed through reconsideration by August 1996. While we have been most careful to follow the express will of Congress in providing opportunity for OVS entry into the video marketplace, I am concerned this compressed timeframe could lead to the adoption of rules that would yield unintended consequences, especially in the form of exacerbated uncertainty that could constrain investment in OVS. Should this occur, the result would be unfortunate twice over: first, because it could hamper the development of OVS as a potential competitor in the video marketplace, and second, because it could lead to unreasonable disparities in investment in other competitors in the video marketplace.

My greatest concern regarding this decision involves the treatment of cost allocation matters. In this decision, the Commission provides that OVS operators may file updated cost allocation manuals (CAMs) prior to initiation of service, subject to the resolution of general cost allocation issues in a separate Part 64 proceeding. This raises particular concern on my part due to the indication that this Commission may still fail to realize the significance of cost allocation in the process of authorizing LEC-owned multichannel voice and video systems. Throughout the extensive and contentious history of the video dialtone proceedings, perhaps no other issue was as critically important, and yet as tentatively treated, as the issue of cost allocation. While the 1996 Act establishes a new framework for LEC entry into the video marketplace through the advent of open video systems, the same vagaries and potential competitive inequities surrounding the treatment of common costs for OVS and voice

networks have not in any way been changed. Accordingly, it is my hope that the Commission's treatment of cost allocation issues in the future will reflect greater attention to these concerns.

Given that the technologies LECs may choose to employ for purposes of developing open video systems remain for the most part undetermined, the types of costs and the manner in which they will be treated likewise remain uncertain. Furthermore, I am concerned that the Commission may be no better prepared today to confront cost and pricing issues presented by a situation where the carrier has an incentive in competing with incumbent cable operators to set a price for video service that is artificially low, rather than the practices associated with artificially high rates as we have been accustomed to addressing. Accordingly, we still must face the question of how we will identify and analyze costs underlying the lower rate that might otherwise go unseen or underestimated, as opposed to scrutinizing inflated cost estimates that might be used to justify a higher rate. Based on these lingering questions, I am uncomfortable accepting that the cost allocation questions are likely to be resolved with greater ease in the context of OVS than we experienced in the video dialtone process. I would have preferred to provide a better opportunity for the Commission to evaluate cost allocation matters by requiring OVS operators to file amended cost allocation manuals at a much earlier time, and in any event prior to the system's construction when operators will begin to incur costs.

I am also concerned by the decision to expand the application of program access rules in the context of programming services, video program packagers, and OVS operators rather than to follow past precedent in applying these rules. In particular, I question the necessity of prohibiting the use of exclusive contracts between cable-affiliated programming services and cable-affiliated programming packagers on the OVS system. The Commission previously has distinguished between the legitimate and beneficial uses of exclusivity, especially in the context of developing technologies such as DBS, as compared to practices that restrict the availability of programming to subscribers.¹ Accordingly, the program access rules have been applied to preclude practices that restrict the availability of programming to subscribers or favor a particular distribution technology to the exclusion of other competing distributors. With respect to their application in the context of cable-affiliated programming services and cable-affiliated programming packagers on the OVS system, I suggest that such exclusive contracts could be a means of establishing stronger and distinct platforms, one of the keys to potential viability for an open video system. In any event, I question how the original competitive concerns -- regarding vertically integrated programming vendors and cable operators with significant horizontal market power in the video marketplace -- that became the basis for program access rules are manifested in the context of a new service, especially one operated by local exchange carriers.

Despite these concerns, I support the Commission's decision because I believe that the

¹ See Implementation of Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Program Distribution and Carriage, First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359 (1993); See also Memorandum Opinion and Order on Reconsideration in MM Docket No. 92-265, 10 FCC Rcd 3105 (1994).

overall package of implementing rules for OVS operators may lead to the advent of another competing service in the video marketplace. In the final analysis, perhaps the compressed timeframe in which this proceeding must be concluded eventually will become a benefit to the extent that interested parties may be able to readdress quickly these issues I am raising as well as other issues to which the Commission may need to devote further thought.

**SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS**

Re: Open Video Systems

The Telecommunications Act of 1996 has planted the seeds for competition in every sector of the telecommunications market. Open Video Systems (OVS), as designed by Congress, can be a starting point for new competition in the video market. I strongly support Congress' goal.

The OVS rules we adopt today are fair and balanced. I firmly believe that they make OVS a viable entry option while ensuring that, if deployed, OVS systems will provide the open platform for programmers that Congress envisioned.

OVS platforms will compete with other video providers, including traditional cable operators, Direct Broadcast Satellite systems, and wireless cable. Yet an OVS system will be fundamentally different. At least two-thirds of the capacity of an OVS platform will be open to programmers unaffiliated with the OVS operator. This is a significant departure from the closed cable model, where the cable operator exercises editorial control over the majority of channels on its system.

To ensure its viability, Congress imposed reduced regulatory constraints on OVS operators in recognition of the "openness" of the platform and the new entrant status of OVS operators. Our rules faithfully reflect this balance. They seek to ensure Congress' vision of an open platform, allowing programming providers, both affiliated and unaffiliated with the OVS operator, to gain access to the platform and provide significant new competition in the video programming market. Our rules also embody the streamlined regulatory approach Congress designed for OVS operators.

The final piece of our OVS implementation will be adopting cost allocation rules for those telephone companies subject to our Part 64 rules that elect to use OVS to enter the unregulated video services market. The Part 64 rules require local exchange carriers to allocate certain costs between regulated and unregulated activities so that ratepayers for regulated interstate telephone services are protected from bearing the costs and risks of nonregulated activities. We will move expeditiously to finalize such rules so that each telephone company will know the regulatory landscape before selecting the best of multiple options for entering the video marketplace.